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7 **IN THE SUPREME COURT**

8 **STATE OF ARIZONA**

9 **In the Matter of:**

Supreme Court No.: R-09-0044

10 **PETITION TO AMEND**
11 **RULES 46-74, RULES OF THE**
12 **SUPREME COURT**

Comment of the Pima County Bar
Association on Petition to Amend
Rules 46-74, Rules of the Supreme
Court

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14 The Pima County Bar Association (PCBA) respectfully submits the following
15 comments and recommendations concerning the pending Petition to Amend Rules
16 46-74, Rules of the Supreme Court.

17 Initially, we would like to thank the Attorney Discipline Task Force and its
18 individual members for their time and efforts in drafting the proposed rule changes
19 concerning attorney discipline. After a careful review of the proposed changes,¹ we
20 believe there is considerable merit in the proposed changes, and believe the Task
21 Force has largely succeeded in creating a system that should deliver quicker
22 resolution and more responsiveness to lawyers and the public, decrease the time
23 and costs to process cases, provide more public input earlier in the disciplinary

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25 ¹ The PCBA established an ad-hoc committee to review the proposed rule
26 changes. Members of that committee included the following: Barbara Atwood,
Cynthia Choate, Kimberly Hunley, Bruce Macdonald, Mark Rubin, D. Greg Sakall,
Denice Shepherd, Brick Storts, and Skip Whitley. The committee's
recommendations were approved as amended by the PCBA Board on March 16,
2010.

1 process, and continue a fair and impartial system comporting with due process.
2 Such were the goals set forth by the Court in its Administrative Order No. 2009-73,
3 and the Task Force has largely succeeded. Ultimately, the success of the proposed
4 changes, if adopted, will depend upon the individuals selected by the State Bar and
5 the Court to administer the disciplinary system.

6 After reviewing the proposed rules, we respectfully offer the following
7 comments and recommendations to the Task Force as it considers any potential
8 amended petition and the Court as it considers final approval of the Task Force's
9 proposals.

10 **A. Comments and Recommendations Regarding the Presiding Disciplinary**
11 **Judge**

12 The Presiding Disciplinary Judge (PDJ) is a totally new officer in the
13 disciplinary system, and a great deal of power seems to reside in that one individual.
14 Under the proposed rules, the PDJ can order parties to attend a settlement
15 conference, preside over formal hearings in contested matters as a member of the
16 hearing panel, impose discipline or transfer attorneys to disability status, shorten or
17 expand time limits, rule on motions, decide challenges for cause as to other
18 members of the hearing panel, and obtain the assistance of bar members to conduct
19 investigations in conflict cases. Under proposed Rule 51, the PDJ is appointed by
20 the Supreme Court, and the qualifications do not require any special knowledge of
21 attorney discipline. While Rule 51 provides for removal of the PDJ for cause in a
22 particular case, the rules does not impose any term limits or mandatory periodic
23 evaluation of the PDJ. In other words, the proposed system seems to envision the
24 appointment of a "career PDJ." In light of the extraordinary authority resting in that
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one individual, we hope that the Task Force and the Court will consider the following recommendations:

1. *Provide that the PDJ be appointed for a term of years, with the possibility of reappointment for an additional term after a thorough performance review.* We believe that the PDJ should be periodically evaluated by the Court after a term of service before continuing in position. The evaluation should include feedback from respondents, complainants, respondents' counsel, Bar counsel, panel members, and other participants in the system. We would suggest that the evaluation be based upon established standards for judicial review, such as the following:

- * administer justice fairly, ethically, uniformly, promptly and efficiently;
- * be free from personal bias when making decisions and decide cases based on the proper application of applies rules, standards, and law;
- * issue prompt rulings that can be understood and make decisions that demonstrate competent legal analysis;
- * act with dignity, courtesy and patience;
- * effectively manage hearings and the administrative responsibilities of the office; and
- * any other criteria deemed appropriate by the Court.

2. *Provide that the PDJ may not serve more than a specified number of years, e.g., more than two terms of service.* By imposing an outside limit on terms of service, the Court could diffuse the concentration of power over time in one individual. We fear that a long-standing PDJ would almost inevitably come to be seen as the "discipline czar." Also, a career PDJ might run the risk of becoming jaded and too psychologically removed from the practice of law to be an effective adjudicative officer in the discipline system. Since self-regulation is a hallmark of the legal profession, we hope that the individuals who occupy the office of PDJ

1 remain closely linked to the profession through relevant expertise and experience. If
2 the Court were to impose an outside limit of eight or ten years of service for the PDJ
3 position, the rotation might enhance the appearance of fair self-regulation and also
4 ensure that the PDJ brings a balanced perspective to the role.

5 **B. Comments and Recommendations regarding Geographic**
6 **Considerations**

7 Even as Arizona nears its statehood centennial in 2012, this State remains
8 incredibly diverse. Attorneys in Phoenix face many different issues than those in
9 Tucson, and both of those groups face many different issues than those faced by
10 attorneys in Arizona's other counties. We believe any disciplinary system should
11 reflect that geographical diversity.

12 With respect to the new probable cause panel known as the Attorney
13 Regulation Committee (ARC), the Task Force has recommended in proposed Rule
14 50 that the ARC be comprised of nine members, including six active members of the
15 state bar and three public, non-lawyer members. It has also recommended that the
16 chief justice "shall appoint the members of the committee considering geographical,
17 gender and ethnic diversity." By way of comparison, the existing Rule 49 provides
18 that the Disciplinary Commission be comprised of "six lawyers who are active
19 members of the state bar, and three non-lawyers. Two of the lawyer members shall
20 be residents of a county or counties other than Maricopa and Pima Counties; the
21 other four lawyer members shall be residents of any combination of Maricopa and
22 Pima Counties."

23 While we appreciate the Court's sometimes difficult task of finding willing
24 attorneys outside Maricopa and Pima counties to serve on the Disciplinary
25 Commission, we believe the proposed Rule 50 goes too far with respect to removing
26 the geographic representation requirements. In establishing a statewide ARC, we

1 believe it would be beneficial to have the input from all corners of the State, not just
2 Maricopa or Pima counties. In order to assure such varied input, we believe a
3 similar geographic quota to that contained in current Rule 49 be included in the final
4 proposal for Rule 50. Such a geographical quota is not unusual in Arizona as a
5 similar quota exists with respect to the makeup of the Arizona Court of Appeals as
6 provided by A.R.S. § 12-120.02. In light of this desire for continued geographic
7 diversity, we hope that the Task Force and the Court will consider the following
8 recommendation:

9 *1. Provide that the six attorney members of the ARC be comprised of two*
10 *attorneys from Maricopa County, two attorneys from Pima County, and two attorneys*
11 *from a county or counties other than Maricopa and Pima County.*

12 Similarly, under the existing disciplinary system, volunteer hearing officers
13 reflect the geographical diversity of the State. We believe the system benefits from
14 having volunteers who are knowledgeable about local attorneys and their
15 reputations in the community. As such, we believe such local knowledge is an
16 important element that should be maintained, if possible, in the volunteers who serve
17 on the proposed hearing panels as set forth in proposed Rule 52. As proposed Rule
18 58(j)(2) preserve the existing rule that any "hearing shall be held in the county in
19 which respondent resides or maintains an office for the practice of law, provided that
20 the principles of forum non conveniens apply[.]" it would be time and cost efficient
21 as well as otherwise beneficial for the volunteer hearing panel members to come
22 from the county in which the hearing will be held. We, therefore, respectfully request
23 the Task Force and the Court consider the following recommendation:

24 *2. Provide that under proposed Rule 52(a) that when possible, the*
25 *volunteer attorney member and the volunteer public member should come from the*
26 *county in which the hearing will be held.*

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2 **C. Comments and Recommendation regarding Terminology of Disciplinary**
3 **Sanctions**

4 We agree with the Task Force's proposed changes to Rule 60 that would
5 change the sanction of informal reprimand to "admonition" to conform to the ABA
6 *Standards for Imposing Lawyer Sanctions*. We would urge the Task Force and the
7 Court to go one step further and consider the following recommendation:

8 1. Amend Rule 60(a)(3) be changed from "Censure" to "Reprimand" to be
9 consistent with the ABA Standards.

10 **D. Comment regarding Proposed Rule 58(k)'s Proportionality Analysis**

11 The Task Force recommends in its proposed Rule 58(k) that any sanctions in
12 cases in which formal hearing proceedings have occurred be imposed "in
13 accordance with the American Bar Association *Standards for Imposing Lawyer*
14 *Sanctions* and, if appropriate, a proportionality analysis."

15 We support the Task Force's recommended Rule 58(k) and specifically its
16 proposal that a proportionality analysis be used, if appropriate. We appreciate the
17 difficulty in a proportionality analysis in disciplinary cases; however, we believe in the
18 principle that like cases should be treated alike, and there can be benefit in
19 considering discipline imposed in prior similar cases. The proposed language allows
20 for a proportionality analysis when appropriate in cases that proceed to a formal
21 hearing, and we would recommend the proposed Rule 58(k) be adopted by the
22 Court.

23 **E. Comment regarding Public Access to Information**

24 The Task Force recommends that two categories of disciplinary records that
25 are currently open will be private: records of dismissals by bar counsel or by ARC,
26 and diversions. The Task Force also recommends that admonitions (previously

1 informal reprimands) with probation, which currently are not published on the State
2 Bar's website, will be published.

3 We support the Task Force's recommendations with respect to making
4 dismissal and diversions private. We would also encourage the Task Force, the
5 Arizona Supreme Court, and/or the recommended Advisory Committee on Attorney
6 Regulation, if established, to consider further changes relating to public access to
7 disciplinary records so as to bring Arizona's approach to public access more in line
8 with Colorado's approach. We believe many of the benefits of the Colorado system,
9 both in terms of its timely resolution of disciplinary complaints as well as its public
10 support, are a result of its approach to public access issues.

11 Conclusion

12 We believe the proposed rules provide an effective system, which if staffed
13 appropriately, can achieve the goals set forth in Administrative Order No. 2009-73,
14 as well as benefit the Court, the State Bar, and the public. We have provided the
15 foregoing comments and recommendations to improve upon the Task Force's
16 existing proposal.

17 Therefore, the PCBA respectfully requests the Task Force to submit an
18 amended petition adopting the above recommendations, and the Court adopt the
19 changes in any such amended petition.

20 RESPECTFULLY SUBMITTED this 1st day of April, 2010.

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23 By 
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1 Electronic copy filed
with the Clerk of the Supreme
2 Court of Arizona this 1st day
of April, 2010.

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4 Copy emailed to the Attorney
Discipline Task Force,
ADTF@courts.az.gov, this
5 1st day of April, 2010.

6 By: 

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